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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES VANADIUM CORPORATION AND ELECTRO METALLURGICAL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review that part of the judgment of the Court of Appeals for the Tenth Circuit entered on February 11, 1956, which affirmed the district court's order dismissing the information as to respondents United States Vanadium Corporation and Electro Metallurgical Company.

OPINION BELOW

The opinion of the court of appeals (App. 16–23) has not yet been reported. The opinion of the district court (R. 16–19) is reported in 132 F. Supp. 388.

JURISDICTION

The judgment of the court of appeals (App. 23) was entered on February 11, 1956. The time for filing a petition for a writ of certiorari was extended by Mr. Justice Clark on March 5, 1956, to April 11, 1956 (App. 24). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The district court dismissed a criminal information charging violations of the Sherman Act as to certain of the corporate defendants which were merged or dissolved after the information had been filed. The criminal provisions of the Act apply to any "person," and Section 8 defines "person" as including "corporations * * * existing under * * * the laws of any State." The following questions are presented:

1. Whether a merged or dissolved corporation which, under the law of the state of incorporation, continues to exist for many purposes (even if not for purposes of state criminal prosecution), is an "existing" corporation which remains subject to criminal prosecution under the Sherman Act.

2. If the answer to question 1 depends upon whether under state law the corporation is subject to state criminal prosecution, whether, under the laws of the States of Delaware and West Virginia, criminal proceedings survive the merger or dissolution of corporate defendants.

STATUTES INVOLVED

The pertinent provisions of Sections 1, 2 and 8 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U. S. C. 1, 2 and 7, commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemd guilty of a misdemeanor, * * *.
>
> SEC. 8. The word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Sections 261 and 278 of the Delaware Code Annotated (Title 8, 1953) provide in pertinent part:

§ 261. EFFECT OF CONSOLIDATION OR MERGER UPON PENDING ACTIONS.

Any action or proceeding pending by or against any of the corporations consolidated or merged may be prosecuted as if such consolidation or merger had not taken place, or the corporation resulting from or surviving such consolidation or merger may be substituted in its place.

* * * * *

§ 278. CONTINUATION OF CORPORATION AFTER DISSOLUTION FOR PURPOSES OF SUIT AND WINDING UP AFFAIRS.

All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of three years from such expiration or dissolution, bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which the corporation shall have been established. With respect to any action, suit, or proceeding begun or commenced by or against the corporation prior to the expiration or dissolution and with respect to any action, suit or proceeding begun or commenced by or against the corporation within three years after the date of the expiration or dissolution, the corporation shall, only for the purpose of

such actions, suits or proceedings so begun or commenced, be continued bodies corporate beyond the three-year period and until any judgments, orders, or decrees therein shall be fully executed.

Section 3095 of the West Virginia Code (Chapter 31, 1949) provides:

§ 3095. *Effect of Dissolution or Expiration.*—When a corporation shall expire or be dissolved as prescribed in this article, its property and assets shall be subject to the payment of the corporate obligattions and the expenses of winding up its affairs, and the surplus, if any, to distribution among the stockholders according to their respective rights. The board of directors and the executive officers in office at the date of such expiration or dissolution, and their successors in office, shall have the right to fill any vacancy in any executive office and of the board of directors by appointment; and they and their successors in office may cause suits to be brought, conducted, prosecuted or defended, the real and personal property of the corporation to be conveyed or transferred under the common seal or otherwise, further assurances of previous conveyances to be made, and all lawful acts to be done, in the corporate name, in like manner and with like effect as before such dissolution or expiration; but so far only as shall be necessary or proper to do and perform every act and thing which should have been or should be done and performed by the corporation, and for collecting the debts and claims due to the corporation, converting its property and assets into money,

prosecuting, defending and protecting its rights, enforcing all claims in its favor, and paying over and distributing its property and assets, or the proceeds thereof, to those entitled thereto.

STATEMENT

On September 21, 1948, the United States filed an information charging Union Carbide and Carbon Corporation, Vanadium Corporation of America, and three of the former's wholly-owned subsidiary corporations, with violating Sections 1 and 2 of the Sherman Act by combining and conspiring to fix prices and to monopolize sales of ferrovanadium and vanadium oxide (R. 3–10). Following the filing of the information, one of the subsidiaries, Electro Metallurgical Company, a West Virginia corporation, was dissolved pursuant to the laws of that state; and the other two, United States Vanadium Corporation, a Delaware corporation, and Electro Metallurgical Sales Corporation, a New York corporation, were merged with Union Carbide (R. 12–13).

On January 7, 1954, Union Carbide moved to dismiss the information as to the three subsidiaries on the ground that their merger or dissolution abated the criminal action (R. 11). The district court granted the motion (R. 16–19). It held that the law of the state of incorporation determines whether merger or dissolution abates a Sherman Act criminal proceeding, and that under

the respective laws of West Virginia, Delaware and New York, a criminal action does not survive merger or dissolution (R. 17–19).

On appeal, the Court of Appeals for the Tenth Circuit affirmed the dismissal as to the Delaware and West Virginia corporations, but reversed the dismissal as to the New York corporation (App. 23). The court held (App. 17) that the question whether a criminal action abates upon dissolution was to be determined by state law, and it concluded that under New York law a criminal action survives corporate dissolution, but that under Delaware and West Virginia law it does not. In holding that Delaware law continues corporate existence after dissolution only for civil, and not for criminal purposes, the court followed its prior decision in *United States* v. *Safeway Stores, Inc.*, 140 F. 2d 834. It recognized that the *Safeway* case was in conflict with a later decision by the Seventh Circuit (*United States* v. *P. F. Collier & Son Corp.*, 208 F. 2d 936), which held that under Delaware law a criminal proceeding does survive dissolution (App. 18), and it intimated that members of the panel might not be "in full sympathy" with *Safeway* (App. 18). Nevertheless, the court refused to reexamine *Safeway*, as the Government had requested it to do, on the ground that "one panel of the court should not lightly overrule a decision by another panel" (App. 18), and it decided to

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"adhere" to *Safeway* "until the Supreme Court has spoken" (App. 18).[1]

REASONS FOR GRANTING THE WRIT

This case presents an important matter of federal law which has not been, but should be, settled by this Court, namely, the proper standard for determining whether a pending criminal proceeding under the Sherman Act is abated by the merger or dissolution of a corporate defendant. The court below held that the action had abated as to the Delaware and West Virginia corporations because it concluded that, under the laws of those jurisdictions, *state* criminal proceedings do not survive merger or dissolution. We submit, however, that (1) the test for determining whether a Sherman Act criminal proceeding abates is not whether state criminal proceedings would survive, but whether state law continues post-dissolution corporate existence for any purpose; and (2) in any event, under Delaware and West Virginia law, a merged or dissolved corporation remains subject to criminal prosecution.

1. Sections 1 and 2 of the Sherman Act provide that any "person" who combines or conspires to restrain, or who monopolizes, interstate

[1] On the basis of the similarity between the West Virginia and Delaware statutes, the court also concluded that under West Virginia law criminal actions abate upon dissolution (App. 18–19).

commerce may be convicted of violation thereof. Section 8 defines "person" as including "corporations * * * existing under * * * the laws of any State." Thus, although Section 8 requires reference to state law to determine whether a corporation may be held criminally liable, the answer to that question depends solely on whether the corporation "exists" under that law. We believe that if state law continues corporate existence after merger or dissolution, albeit not for purposes of *state* criminal prosecution, the dissolved corporation remains an "existing" one under Section 8 and therefore continues subject to federal criminal prosecution under the Sherman Act.

Under both Delaware and West Virginia law, merged or dissolved corporations continue to exist for many purposes. Thus, Delaware provides that all corporations shall "be continued" as "bodies corporate" for three years after dissolution for purposes of prosecuting or defending litigation pending at dissolution or instituted within that period, and of "enabling them gradually to settle and close their business" (*supra,* pp. 4–5). In addition, the Delaware Code provides specifically that, in the event of merger, "any action or proceeding pending by or against" the merged corporation "may be prosecuted as if such * * * merger had not taken place." West Virginia law contains similar provisions (*supra,*

pp. 5–6). In short, "the State has elected to keep the corporation in existence, maimed but still alive," and it cannot "preserve the artificial entity for a purpose of her own and destroy it for the purpose of withdrawal from the supremacy of federal law." Mr. Justice Cardozo, dissenting in *Chicago Title and Trust Co.* v. *Wilcox Bldg. Corp.*, 302 U. S. 120, 131.[2] Cf. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 345–346.

The broad definition of "person" in Section 8 was plainly designed "to preclude any narrow interpretation" (*United States* v. *Cooper Corp.*, 312 U. S. 600, 607) of the categories of persons subject to criminal penalties for violation of the Sherman Act. We believe that Congress intended in Section 8 to provide such penalties for all cor-

[2] Justices Stone and Black joined in this dissent. The *Chicago Title* case did not decide the issue here presented. It held only that a dissolved Illinois corporation could not, after expiration of the two-year statutory period within which dissolved corporations could sue or be sued, file a petition for reorganization under Section 77B of the Bankruptcy Act. The holding is not dispositive of the question whether a pending federal criminal action is abated by dissolution of a corporate defendant which, under state laws, continues to exist thereafter for many purposes.

porations which, under state law, have any post-dissolution existence.[3]

2. The decision below, that under Delaware law a pending criminal action does not survive corporate dissolution, is in direct conflict with the decision of the Court of Appeals for the Seventh Circuit in *United States* v. *P. F. Collier & Son, Corp.*, 208 F. 2d 936. In the *Collier* case the court, in concluding that a criminal proceeding under the Fair Labor Standards Act would lie against a Delaware corporation which had been dissolved *before* the information had been filed, held that under Delaware law a disolved corporation continues subject to criminal prosecution. A district court in the Fourth Circuit also recently reached the same conclusion in a Sherman Act criminal case. *United States* v. *Maryland State Licensed Beverage Association*, D. Md., Cr. No. 23212, Jan. 10, 1956.

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[3] Under state law generally, a Sherman Act civil action brought by the Government would not be abated by dissolution. The Government sometimes files companion civil and criminal cases under the Sherman Act based on the same violations. It would be anomalous, indeed, if the criminal action, which is designed to impose punishment for past violation, were to abate on dissolution of the defendant while the civil suit, designed to terminate violation and prevent recurrence, were to remain pending.

We submit that the Delaware statute does provide for survival of criminal proceedings against merged or dissolved corporations. Section 278 of the Delaware Code (*supra*, pp. 4–5) provides that "any action, suit, or proceeding" begun by or against a corporation before or within a period of three years after dissolution shall continue "until any judgments, orders, or decrees therein shall be fully executed." In the *Collier* case the court construed this broad language—and we think correctly—as providing for survival of "all forms of litigation, civil, criminal, bankruptcy and admiralty." 208 F. 2d at 940. Indeed, in the instant case the court of appeals intimated that members of the panel might not be "in full sympathy" with the court's prior holding in the *Safeway* case that the Delaware Code does not provide for survival of criminal proceedings, but determined to follow *Safeway* "until the Supreme Court has spoken."

Although ordinarily this Court will not review questions of state law, we believe that it should resolve this conflict between circuits as to the interpretation of an important Delaware statute which has not been construed by the Delaware courts and which plays a significant role in Federal criminal litigation. For, if the question of post-dissolution survival of Sherman Act criminal cases depends upon whether the state survival statute applies to criminal proceedings (but

see Point 1, *supra*), uncertainty will continue unless and until the present inter-circuit conflict is settled. A substantial, if not the major, number of corporate defendants in Sherman Act cases are Delaware corporations, and the answer to whether a Delaware corporation may escape Sherman Act criminal punishment by dissolution should not depend upon the circuit in which the proceeding is brought. Furthermore, the provisions of the Delaware statute are similar to those of many other states, and an authoritative ruling on the Delaware Act will be a persuasive precedent in construing the other statutes.[4] Indeed, unless resolved by this Court, the existing conflict will inevitably lead to further litigation in those circuits which have not yet passed upon the question.

3. The question of the effect of merger or dissolution upon pending Sherman Act criminal proceedings is an important and recurring one in the administration of the Act. The recent increase from $5,000 to $50,000 in the maximum

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[4] The court of appeals (App. 18–19, *infra*), finding that the law of West Virginia "[i]n many aspects * * * resembles the law of Delaware," reached the same conclusion as to the West Virginia subsidiary corporation here involved. Although the question of West Virginia law is not in itself of sufficient importance to warrant review, as presented in the context of this case we believe it should be reviewed along with the similar question arising under the law of Delaware.

fine for Sherman Act violations (Ch. 281, Public Law 135, 84th Cong., 1st Sess. (1955)) may encourage corporate defendants to evade criminal responsibility by changing their corporate structure through mergers and dissolutions. See *United States* v. *Cigarette Merchandisers Association,* 136 F. Supp. 214, 215 (S. D. N. Y.). If dissolution abates pending criminal proceedings, private treble damage litigants, whose suits would not be abated, may be denied the benefits of a judgment in the Government suit. 15 U. S. C. 16. Finally, the dismissal of certain defendants may increase the Government's problems of proof as to the remaining defendants.

The question has been before courts of appeals three times,[5] and there have been a number of district court cases where dismissal was sought following dissolution.[6] In addition, the question

[5] In addition to the case at bar and the *Safeway* case, the Court of Appeals for the Sixth Circuit has held in a Sherman Act criminal proceeding that under Delaware law criminal actions do not survive corporate dissolution. *United States* v. *Line Material Co.*, 202 F. 2d 929.

[6] *United States* v. *Cigarette Merchandisers Association*, *supra*, p. 14; *United States* v. *Maryland State Licensed Beverage Association*, *supra*, p. 11; *United States* v. *King*, W. D. Texas, San Antonio Division, No. 13147 Criminal, August 25, 1948; *United States* v. *Anchorage Retail Liquor Dealers Association*, D. Alaska, Third Div., Cr. No. 2379, Feb. 9, 1951. Cf. *United States* v. *Western Pennsylvania Sand and Gravel Association*, 114 F. Supp. 158 (W. D. Pa.) (injunction against dissolution obtained to prevent possible ouster of jurisdiction).

may arise, and indeed has arisen,[7] in criminal proceedings under other federal statutes.

CONCLUSION

The petition presents an important question of Federal law which has not been, but should be, settled by this Court, and the decision below is in conflict with that of another court of appeals. It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.
STANLEY N. BARNES,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
JOHN BODNER, JR.,
Attorneys.

APRIL 1956.

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[7] *United States* v. *P. F. Collier & Son*, *supra* (Fair Labor Standards Act); *United States* v. *Leche*, 44 F. Supp. 765 (E. D. La.) (Connally Hot Oil Act).

APPENDIX

United States Court of Appeals, Tenth Circuit

No. 5211—November Term, 1955

UNITED STATES OF AMERICA, APPELLANT

v.

UNITED STATES VANADIUM CORPORATION, ELECTRO METALLURGICAL COMPANY AND ELECTRO METALLURGICAL SALES CORPORATION, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

(February 11, 1956)

Before HUXMAN, MURRAH and PICKETT, United States Circuit Judges

HUXMAN, *Circuit Judge.*

The sole question presented for decision is whether three subsidiary corporations against whom criminal proceedings are pending are entitled to have such criminal proceedings abated, when they thereafter are merged with a parent corporation and have surrendered their charter.

The three subsidiaries against whom criminal actions were pending at the time they were merged with their parent, the Union Carbide and Carbon Corporation, were the Electro Metallurgical Company, a West Virginia corporation, the United States Vanadium Corporation, a Dela-

ware corporation, and the Electro Metallurgical Sales Corporation, a New York corporation. Upon merger with their parent the three subsidiaries were dissolved under the laws of the state of their incorporation. The trial court decided the question in the affirmative and dismissed the criminal proceedings pending against them; the Government has appealed.

There is no conflict in the basic principles of law which must guide us in seeking the correct answer. Thus it is established without exception that at common law, upon dissolution, a corporation ceases to exist for all purposes. It can no more be sued civilly or prosecuted criminally than can a natural person who has died.[1] It is equally well established that such common law status relating to dissolved corporations has been modified and changed by statute in the various states and that under such statutes proceedings and actions as authorized thereby may be maintained against such corporations. Also well settled is the principle that in determining whether upon dissolution the life of a corporation comes to an end for all purposes or whether it remains in a state of suspended animation so to speak for the purposes of the statute, we look to the state law and its construction by the state courts.

No decisions by the courts of Delaware, West Virginia, or New York are cited and our search has failed to reveal any which would definitely and completely answer this question. In *United*

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[1] See *United States* v. *Safeway Stores, Inc.*, 140 F. 2d 834, and cases there cited.

States v. *Safeway Stores, Inc.*, 140 F. 2d 834, we held that a criminal prosecution brought against a dissolved Delaware corporation did not survive. This conclusion is supported by the Sixth Circuit in *United States* v. *Line Material Company*, 202 F. 2d 929. However, in *United States* v. *P. F. Collier and Son Corporation*, 208 F. 2d 936, the Seventh Circuit reached a contrary conclusion. In the light of these later decisions we are asked to reexamine the *Safeway* case, and in effect, are asked to overrule it. Assuming without deciding that members of this panel of the court are not in full sympathy with the law as declared in the *Safeway* case, for reasons presently stated we nonetheless adhere to the doctrine there announced. We feel that one panel of the court should not lightly overrule a decision by another panel. To do so puts the law into a state of flux, and no one can tell what the law will be until the composition of the court is determined. Since the Circuits are not in agreement as to the law of Delaware and until the Supreme Court has spoken, we adhere to the law as declared in the *Safeway* case, *supra*. Since we have reached this conclusion, nothing of value would be added if we analyzed the decisions of the three Circuits which have construed the Delaware law.

Appellee Electro Metallurgical Company was a West Virginia corporation. The law of West Virginia with respect to dissolved corporations provides with limitations that suits may be brought, conducted, prosecuted or defended, etc.,

after dissolution.[2] No decisions have been found interpreting the West Virginia dissolution law. In many aspects it resembles the law of Delaware. We find nothing therein which would require a different conclusion from that with respect to the Delaware law.

With respect to the New York subsidiary a somewhat different picture is presented. While no New York decisions are cited which have specifically passed upon the question, there are certain decisions which point the way. There was also filed with us at the time of oral argument a photostatic copy of an opinion by United States District Judge Weinfeld of the Southern District of New York, in which he held that

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[2] § 3095 (1949) provides:

"EFFECT OF DISSOLUTION OR EXPIRATION.

"When a corporation shall expire or be dissolved as prescribed in this article, its property and assets shall be subject to the payment of the corporate obligations and the expenses of winding up its affairs, * * *. The board of directors and the executive officers in office at the date of such expiration or dissolution, * * * may cause suits to be brought, conducted, prosecuted or defended, the real and personal property of the corporation to be conveyed or transferred under the common seal or otherwise, further assurances of previous conveyances to be made, and all lawful acts to be done, in the corporate name, in like manner and with like effect as before such dissolution or expiration; but so far only as shall be necessary or proper to do and perform every act and thing which should have been or should be done and performed by the corporation, and for collecting the debts and claims due to the corporation, converting its property and assets into money, prosecuting, defending, and protecting its rights, enforcing all claims in its favor, and paying over and distributing its property and assets, or the proceeds thereof, to those entitled thereto."

under New York law a criminal action survived the dissolution of a corporation.[3] In reaching this conclusion he relied upon Section 90 of the New York stock corporation law which provides, "The rights of creditors of any constituent corporation shall not in any manner be impaired, nor shall any liability or obligation due or to become due, or any claim or demand for any cause existing against any such corporation or against any stockholder thereof be released or impaired by any such consolidation; * * * and no action or proceeding then pending before any court or tribunal in which any constituent corporation is a party * * * shall abate or be discontinued by reason of such consolidation, but may be prosecuted to final judgment, as though no consolidation had been entered into; * * *." Attention was also called to Section 11-a of the New York general construction law which provides that "'Action' when applied to judicial proceedings, signifies an ordinary prosecution in a court of justice, by a party against another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Actions are of two kinds: civil and criminal." From this Judge Weinfeld concluded that the word "action" in Section 90 embraced both civil and criminal proceedings. With this reasoning we agree.

But aside from statutory construction and consideration, Judge Weinfeld concluded that the

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[3] See *United States of America* v. *Cigarette Merchandisers Association, Inc., et al.*, opinion filed November 23, 1955.

clear public policy of New York with respect to dissolved or consolidated corporations included the "right of the community to vindicate any charge against the corporation for crimes it may have committed prior to dissolution."

Appellees seek to distinguish the Cigarette Merchandisers case on the ground that it was decided under Section 90 dealing with consolidations, while these cases arose under Section 87 and Section 29 of the New York Code which deal with the merger of corporations. For the decision of the question before us, this in our view is a distinction without a difference. Neither Section 85 nor Section 29 deal with what pending causes of action survive the dissolution of a corporation. Section 29 merely provides that in the event of a dissolution of a corporation for any cause or in any manner its corporate existence shall continue for the purpose of winding up its affairs, and Section 85 provides that when a certificate is filed all the property of the merged corporation vests and is held and enjoyed by the successor corporation subject to all liabilities and obligations of the merged corporation. Subsection 8 of Section 105 provides that such a corporation shall continue for the purpose of satisfying obligations and collecting assets, and that for such purposes it may sue and be sued.

The Cigarette Merchandisers case was not decided on the narrow ground that the law declared therein applied only in the case of consolidation and was not intended to cover mergers. In the statement of facts in that case it is stated that the stockholders of the "Rowe" Corporation

"voted to *merge*[4] and consolidate," and further on it is stated that under the New York law governing consolidation a merged corporation is continued for purposes of criminal prosecution.

There is, of course, a legal and technical distinction between merger and consolidation of two companies, which for some purposes may become important. However, for the purpose of answering the question presented to us, it is in our view immaterial whether there is a merger or consolidation. In the case of a merger the merged corporation is absorbed by the merging company and ceases to exist, while the merging company continues its existence. In the case of a consolidation of two companies, a new entity is created into which both of the consolidated companies are absorbed. In each instance the question is what becomes of criminal prosecutions pending against companies which now no longer exist, either as a result of a merger or of a consolidation.

We see nothing in Section 87 which leads us to conclude that with respect to liability under a pending criminal action the status of a nonexistent corporation resulting from a merger is controlled by different principles of law than is the status of such a company when it becomes extinct by consolidation.

Since the decision in the Cigarette Merchandisers case is by a federal court, it is of course not binding upon us. We, however, feel that it is a well reasoned case and that it correctly analyzes the New York law. It is our conclu-

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[4] Emphasis supplied.

sion that under New York law a criminal action pending against a corporation which is merged survives the same as in the case of its consolidation.

In *United States* v. *Electro Metallurgical Company* and in *United States* v. *United States Vanadium Corporation* the judgments are affirmed. In *United States* v. *Electro Metallurgical Sales Corporation* the judgment is reversed and the cause is remanded for proceedings in conformity with the views expressed herein.

Judgment

Fifty-eighth Day, November Term, Saturday, February 11th, 1956

Before Honorable WALTER A. HUXMAN, Honorable ALFRED P. MURRAH and Honorable JOHN C. PICKETT, Circuit Judges

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause with respect to Electro Metallurgical Company and United States Vanadium Corporation be and the same is hereby affirmed. It is further ordered that the judgment with respect to Electro Metallurgical Sales Corporation be and the same is hereby reversed and the cause remanded for further proceedings in accordance with the views expressed in the opinion of the court.

Supreme Court of the United States

No. —, October Term, 1955

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES VANADIUM CORPORATION, ELECTRO METALLURGICAL COMPANY AND ELECTRO METALLURGICAL SALES CORPORATION

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 11, 1956.

/S/TOM C. CLARK,
Associate Justice of the
Supreme Court of the United States.

Dated this 5th day of March 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956

MAY 7 195
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 848

UNITED STATES OF AMERICA, Petitioner,

v.

UNITED STATES VANADIUM CORPORATION AND ELECTRO METALLURGICAL COMPANY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Brief for Respondent in Opposition

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THE W. H. KISTLER STAT'Y CO., DENVER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 848

UNITED STATES OF AMERICA, Petitioner,

v.

UNITED STATES VANADIUM CORPORATION AND ELECTRO METALLURGICAL COMPANY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Brief for Respondent in Opposition

OPINIONS BELOW

The opinion of the District Court is reported at 132 F. Supp. 388. The opinion of the Circuit Court of Appeals for the Tenth Circuit (App. p. 16, Petition) is not yet reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

The question presented is whether a criminal prosecution under the Sherman Act brought against a Delaware and a West Virginia corporation which have been dissolved and merged abates as in the case of a deceased individual,

or whether the corporations remain in existence under the laws of their respective states of incorporation or otherwise so as to permit the prosecution to continue.

STATUTES INVOLVED

In addition to the statutes cited by the government (pp. 3-6, Petition), we refer to the additional pertinent provisions of the Delaware law, to-wit: Secs. 253 and 259, Delaware Code Annotated (Title 8, 1953), Appendix A.

STATEMENT

A criminal information under the Sherman Act was filed on September 21, 1948, against Union Carbide and Carbon Corporation and three of its subsidiaries, United States Vanadium Corporation, Electro Metallurgical Company and Electro Metallurgical Sales Corporation. Thereafter the three corporations were merged into the parent corporation and dissolved. The United States District Court for the District of Colorado thereupon dismissed the prosecution as against all three of the merged subsidiaries, on the ground that the dissolution of a corporation, like the death of an individual, abates a criminal prosecution, unless the law of the state under which it was created preserves its life for such prosecution. The Court held that the laws of none of the states of incorporation of the three subsidiaries preserved the corporations for purposes of criminal prosecution and dismissed the case as to the said three subsidiaries.

On appeal to the United States Court of Appeals for the Tenth Circuit that Court held that the laws of the State of New York did preserve the life of the New York corporation, Electro Metallurgical Sales Corporation, but that the laws of the states of Delaware and West Virginia did not preserve corporate life for purposes of criminal prosecution. It therefore affirmed the decision of the District Court as to United States Vanadium Corporation and Electro Metallurgical Company but reversed as to Electro Metallurgical Sales Corporation. (See our cross-

petition, No. 849, in connection with such reversal.)

REASONS WHY THE WRIT SHOULD BE DENIED

The general principles which govern this case have been long settled by the United States Supreme Court.

In *Oklahoma Natural Gas Company v. State of Oklahoma*, 273 U.S. 257, 259, 71 L.Ed. 634, Mr. Chief Justice Taft, speaking for the Court, said:

> " * * * It is well settled that at common law and in the Federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution can not be distinguished from the death of a natural person in its effect. * * * To allow actions to continue would be to continue the existence of the corporation pro hac vice. But corporations exist for specific purposes, and only by legislative act, so that if the life of the corporation is to continue even only for litigating purposes it is necessary that there should be some statutory authority for the prolongation. The matter is really not procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the state which brought the corporation into being." (273 U.S. 259, 260, 71 L.Ed. 635, 636.)

In *Chicago Title & Trust Company, as Successor Trustee, v. Forty-one Thirty-six Wilcox Building Corporation*, 302 U.S. 120, 82 L.Ed. 147, a dissolved Illinois corporation sought to institute bankruptcy proceedings under Sec. 77B of the Bankruptcy Act more than two years after dissolution, contending that the power of the federal government over bankruptcy was constitutionally paramount over state authority to annul corporate existence. The Court cited with approval the *Oklahoma Natural Gas* case, *supra*, to the effect that the dissolution of a corporation puts an end to its existence, the result of which may be likened to the death of a natural person. The Court then said:

"How long and upon what terms a state-created corporation may continue to exist is a matter exclusively of state power." Citing cases. "The circumstances under which the power shall be exercised and the extent to which it shall be carried are matters of state policy, to be decided by the state legislature. There is nothing in the federal Constitution which operates to restrain a state from terminating absolutely and unconditionally the existence of a state-created corporation, if that be authorized by the statute under which the corporation has been organized. And it hardly will be claimed that the federal government may breathe life into a corporate entity thus put to death by the state in the lawful exercise of its sovereign authority.

"The power to take the long step of putting an end to the corporate existence of a state-created corporation without limitation, connotes the power to take the shorter one of putting an end to it with such limitations as the legislature sees fit to annex. Compare Packard v. Banton, 264 U.S. 140, 145, 68 L.Ed. 596, 608, 44 S.Ct. 257; Davis v. Massachusetts, 167 U.S. 43, 47, 42 L.Ed. 71, 72, 17 S.Ct. 731; Rippey v. Texas, 193 U.S. 504, 509, 510, 48 L.Ed. 767-769, 24 S.Ct. 516. And since the federal government is powerless to resurrect a corporation which the state has put out of existence for all purposes, the conclusion seems inevitable that if the state attach qualifications to its sentence of extinction, nothing can be added to or taken from these qualifications by federal authority." (302 U.S. 127, 128; 82 L.Ed. 152.)

The government's contention that the Sherman Act is paramount to the state corporation law and by its own power preserves the corporate life for prosecution, is identical with the argument made in the bankruptcy case, *Chicago Title & Trust Company, supra,* that the bankruptcy law of the United States was paramount to the

state corporation law. The logic which led the Court to reject that argument leads inevitably to the rejection of the government's present contention.

There remains solely the question of construction of state laws. The United States District Court and the Court of Appeals for the Tenth Circuit both found that the corporate lives of the respondents in the pending petition were not preserved by state law for the purposes of criminal prosecution. There is no direct decision of the state courts on the matter. Should the United States Supreme Court in this case find that the intention and meaning of the state statutes were that the lives of the corporations be preserved, the state courts could immediately find to the contrary, and the determination of the state courts on questions of state law are binding on all courts of the United States Government. There is grave doubt, therefore, whether questions of the meaning of state laws which will necessarily be governed by the decisions of state courts are properly the subject of certiorari to the United States Supreme Court. Moreover, on the merits, we respectfully submit that there is nothing in any of the state laws in question to indicate any intent to preserve criminal prosecutions, either state or federal, against a dissolved corporation. On the contrary, the whole theory of those laws is that of the trust fund doctrine preserving the property of the dissolved corporation for stockholders and creditors very much in the manner that the estate of a deceased person is administered.

The conflict between the circuits relied on by the government is solely as to the meaning of the Delaware statute. That is a conflict which must ultimately be resolved by the highest court of Delaware, not by the United States Supreme Court.

The wisdom of the laws under which a corporation is created is not a matter of judicial review. If the state laws under which a corporation exists lead to evasion of

federal criminal responsibility, then it is for Congress or the State Legislatures to amend their respective laws in such a way as to foreclose such evasion. The Attorney General also has available the remedy of obtaining injunctions against mergers and/or dissolutions of corporate defendants who are under an indictment for violation of a federal law. The government has sought this remedy on two occasions, succeeding in one instance[1], and failing in the other[2]. The question of the public policy of a state law is not a valid reason for the granting by this Court of a writ of certiorari.

The affidavits of good faith and business purpose of the mergers and dissolution in this case were uncontradicted.

CONCLUSION

We respectfully submit that the petition should be denied.

Respectfully submitted,
GRANT, SHAFROTH AND TOLL
MORRISON SHAFROTH
JOHN F. SHAFROTH
730 Equitable Building
Denver 2, Colorado
Attorneys for Union Carbide and Carbon Corporation into which United States Vanadium Corporation and Electro Metallurgical Company have been merged.

May, 1956.

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1 *United States v. Western Pennsylvania Sand and Gravel Association*, 114 F.Supp. 153 (W.D.Pa.) (injunction against dissolution obtained to prevent possible ouster of jurisdiction).

2 *United States v. Wallace & Tiernan Company et al*, 1954 CCH Trade Cases ¶ 67,659 (injunction denied for the reason that the motion was filed after the merger had been completed).

APPENDIX A

DELAWARE CODE ANNOTATED (TITLE 8, 1953)

Sec. 253

Sec. 259

Sec. 253. Merger or Parent Corporation and Wholly Owned Subsidiary.

(a) Any corporation organized under the provisions of this chapter or existing under the laws of this State, for the purpose of carrying on any kind of business, owning all the stock of any other corporation organized under the provisions of this chapter or existing under the laws of this State, or organized under the laws of any other state of the United States, if the laws under which the other corporation is formed shall permit a merger as herein provided, may file in the office of the Secretary of State a certificate of such ownership in its name and under its corporate seal, signed by its president or a vice-president, and its secretary or treasurer or assistant secretary or assistant treasurer, and setting forth a copy of the resolution of its board of directors to merge such other corporation and to assume all of its obligations, and the date of the adoption thereof. A certified copy of the certificate shall be recorded in the office of the recorder of deeds of the county in which the principal place of business of the parent corporation is located; and if the other corporation is also a Delaware corporation and its principal place of business is located in a different county, another certified copy of the certificate shall be recorded in the office of the recorder of deeds of such other county.

(b) Upon the recording of the certificate pursuant to subsection (a) of this section, all of the estate, property, rights, privileges and franchises of such other corporation shall vest in and be held and enjoyed by such parent corporation as fully and entirely and without change or diminution as the same were before held and enjoyed by such

other corporation, and be managed and controlled by such parent corporation, and except as hereinafter in this section provided in its name, but subject to all liabilities and obligations of such other corporation and the rights of all creditors thereof. The parent corporation shall not thereby acquire power to engage in any business, or to exercise any right, privilege or franchise, of a kind which it could not lawfully engage in or exercise under the provisions of the law by or pursuant to which such parent corporation is organized. The parent corporation shall be deemed to have assumed all the liabilities and obligations of the merged corporation, and shall be liable in the same manner as if it had itself incurred such liabilities and obligations.

(c) The parent corporation may relinquish its corporate name and assume in place thereof the name of the merged corporation, by including it in a provision to that effect in the resolution of merger adopted by the directors and set forth in the certificate of ownership, and upon the filing and recording of such certificate the change of name shall be completed, with the same force and effect and subject to the same conditions and consequences as if such change had been accomplished by proceedings under the appropriate section of this chapter.

(d) Any plan of consolidation or merger which requires or contemplates any change other than those herein specifically authorized with respect to the parent corporation, shall be accomplished under the provisions of sections 251 and 252 of this title. The provisions of section 262 of this title shall not apply to any merger effected under this section.

Sec. 259. Status, Rights, Liabilities, Etc. of Constituent and Surviving Corporations Following Merger or Consolidation.

(a) When an agreement of consolidation or merger shall have been signed, acknowledged, filed and recorded, in accordance with the requirements of this subchapter,

for all purposes of the laws of this State the separate existence of all the constituent corporations, parties to said agreement, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into one of such corporations, as the case may be in accordance with the provisions of said agreement, possessing all the rights, privileges, powers and franchises as well of a public as of a private nature, and being subject to all the restrictions, disabilities and duties of each of such corporations so consolidated or merged, and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, including in the case of banks or trust companies, without any order or other action on the part of any court or otherwise, appointments, designations, and nominations and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, trustee of estates of lunatics and in every other fiduciary capacity, and all debts due to any of said constituent corporations on whatever account, as well for stock subscriptions as all other things in action or belonging to each of such corporations shall be vested in the corporation resulting from or surviving such consolidation or merger; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the resulting or surviving corporation as they were of the several and respective constituent corporations, and the title to any real estate vested by deed or otherwise, under the laws of this State, in any of such constituent corporations, shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach

to said resulting or surviving corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

(b) In the case of a merger of banks or trust companies, any party in interest shall have the right to apply to an appropriate court or tribunal for a determination as to whether the resulting corporation shall continue to serve in the same fiduciary capacity as the merged corporation, or whether a new and different fiduciary should be appointed.

FILED
APR 11 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 849

ELECTRO METALLURGICAL SALES CORPORATION, a Corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to United States Court of Appeals for the Tenth Circuit

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IN THE

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OCTOBER TERM, 1955

No.

ELECTRO METALLURGICAL SALES CORPORATION, a Corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to United States Court of Appeals for the Tenth Circuit

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on February 9, 1956, reversing, with directions, the judgment of the United States District Court for the District of Colorado, entered June 17, 1955, as to petitioner Electro Metallurgical Sales Corporation.

OPINIONS BELOW

The opinion of the district court filed on June 17, 1955, reported in 132 F. Supp. 388, and of the court below filed on February 9, 1956, not yet reported, are for convenience

appended to this petition, marked Appendix A and B, respectively.

JURISDICTION

The date of the judgment sought to be reviewed and the date of its entry are February 9, 1956.

Application for extension of time to file petition for writ of certiorari was filed March 8, 1956, and order granting extension of time to and including April 11, 1956, was entered March 12, 1956.

The jurisdiction of this Court to review the judgment in question by writ of certiorari is invoked under the United States Code, Title 28, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The question presented is whether a criminal prosecution under the Sherman Act, brought against a New York corporation subsequently dissolved and merged, abates as in the case of a deceased individual, or whether the corporation remains in existence under New York law or otherwise so as to permit the prosecution to continue.

STATUTES INVOLVED

Stock Corporation Law, Art. 8, Ch. 59, Sec. 85.1, 2, and Sec. 90, Consolidated Laws of New York (Laws of 1923, Ch. 787, amending generally Laws of 1909, Ch. 61); and General Corporation Law, Art. 2, Ch. 23, Sec. 29, Consolidated Laws of New York (Laws of 1929, Ch. 650), Appendix C.

STATEMENT OF CASE

This is a two-count criminal information filed September 21, 1948, in the United States District Court for the District of Colorado against Union Carbide and Carbon Corporation, three subsidiaries thereof, and Vanadium Corporation of America. Petitioner was one of the three defendant subsidiaries aforesaid.

The information charges these defendants in Count I with conspiracy to monopolize interstate and foreign trade and commerce in ferro-vanadium and vanadium oxide in violation of Section 2 of the Sherman Act, and in Count II with conspiring to fix prices for the sale of ferro-vanadium and vanadium oxide and for the purchase of vanadium-bearing ore, in violation of Section 1 of the Sherman Act (R. 3-11).

On January 7, 1954, a motion was filed to dismiss the information as to the three co-defendant subsidiaries of Union Carbide and Carbon Corporation, on the ground that subsequent to the filing of this information and the entry of "Not Guilty" pleas thereto by all defendants, the three subsidiaries had been dissolved and merged into Union Carbide and Carbon Corporation. Defendant Electro Metallurgical Company was dissolved on December 31, 1948, pursuant to the laws of West Virginia, its state of incorporation; United States Vanadium Corporation and Electro Metallurgical Sales Corporation were merged into Union Carbide and Carbon Corporation on December 30, 1950 and February 28, 1949, respectively, pursuant to the laws of their states of incorporation, Delaware and New York (R. 11), and their existence terminated.

The District Court sustained the motion and on June 17, 1955 dismissed as to petitioner and the other two subsidiaries. It held that merger or dissolution terminated the existence of the corporations in each of the states; that the criminal prosecution therefore abated unless preserved by state statute; and that it was not preserved by the laws of any of the states of incorporation of the subsidiaries (R. 16-19).

The Court of Appeals on February 9, 1956 affirmed the dismissal as to two of the subsidiaries, United States Vanadium Corporation and Electro Metallurgical Company. The United States has indicated its intention to apply for a writ of certiorari as to that ruling and the record

has been forwarded by the Clerk of the Court of Appeals to the Solicitor General for filing in this Court.

The Court of Appeals on the same date reversed the District Court's dismissal as to petitioner, Electro Metallurgical Sales Corporation, a New York corporation. It held that under New York law the life of the corporation was preserved for this prosecution.

BASIS OF FEDERAL JURISDICTION IN DISTRICT COURT

Federal jurisdiction in the United States District Court rested on United States Code, Title 18, Section 3231, and on the Sherman Act, United States Code, Title 15, Sections 1 and 2.

REASONS FOR ALLOWANCE OF WRIT

The government has requested, or is about to request, a writ of certiorari as to that part of the judgment of the Court of Appeals which *affirmed* the dismissal as to petitioner's co-subsidiaries, a West Virginia corporation and a Delaware corporation. The same basic question in reverse is involved in petitioner's case, plus a conflict with the applicable law of New York. Even if the Court should not deem this of sufficient importance to warrant certiorari independent of the government's application, we submit that if certiorari is granted on the government's petition as to the West Virginia and Delaware corporations, the Court should review the entire case and correct the plain error of the Court of Appeals in its interpretation of the law of New York, on which it based its reversal in petitioner's case.

This Court has held that at common law and in the federal jurisdiction a corporation which has been dissolved is as if it did not exist and that the result of the dissolution cannot be distinguished from the death of a natural person in its effect. *Oklahoma Natural Gas Co. v. State of Oklahoma,* 273 U.S. 257, 47 S.Ct. 391, 71 L.Ed. 634.

In *Chicago T. & T. Co. v. Forty-one Thirty-six Wilcox Bldg. Corp.*, 302 U.S. 120, 58 S.Ct. 125, 82 L.Ed. 147, the Court held that a private corporation in this country could only exist under the express law of the state by which it was created, that its dissolution put an end to its existence as in the case of a natural person, and that there must be some statutory authority for the prolongation of its life, even for litigation purposes. The Court further held that the state could either extinguish a corporation absolutely or continue its existence for specified purposes only, and that the federal government was without power to add to or take away from the qualifications to extinction provided by state law.

The error of the court below in construing the New York law as preserving the life of the merged subsidiary arose out of two misconceptions:

1. It applied the consolidation statute to a merger, in effect adding to the merger statute language that does not appear therein.

2. It misinterpreted this language which was taken from the consolidation statute.

Corporate merger is governed in New York by Section 85 of the New York Stock Corporation Law. It was under that section that petitioner was merged into Union Carbide and Carbon Corporation.

The merger statute is primarly aimed at the case of a wholly-owned subsidiary. In a merger the surviving possessor corporation into which the subsidiary has been merged continues to exist, while the subsidiary is dissolved.

Section 85.1 of the New York Stock Corporation Law provides:

> " • • • Upon the filing of such certificate," (of merger) "all of the estate, property, rights, privileges and franchises of such other corporation, shall vest in and be held and enjoyed by such possessor corpora-

tion * * * *but subject to all liabilities and obligations of such other corporation and the rights of all creditors thereof.* * * * " (Emphasis supplied)

Section 85.2 provides:

"The possessor corporation shall be deemed to have assumed all the liabilities and obligations of the merged corporation and shall be liable in the same manner as if it had itself incurred such liabilities and obligations."

That the intent of this merger statute was to preserve civil liabilities and obligations only, seems self-evident. One corporation cannot assume the criminal guilt of another.

Consolidation is provided for by Section 90 of the New York Stock Corporation Law and requires different procedure and brings different results. Since the language of the consolidation statute was relied on by the court below, we will briefly consider it.

Upon consolidation of several corporations, a new corporation comes into existence, while the old are dissolved.

Section 90 is entitled, "Rights of Creditors of Consolidated Corporations." It provides that the rights of creditors shall not be impaired by the consolidation nor shall any liability or obligation existing against the corporation or any stockholder be released or impaired,

" * * *; but such consolidated corporation shall be deemed to have assumed and shall be liable for all liabilities and obligations of each of the corporations consolidated, in the same manner as if such consolidated corporation had itself incurred such liabilities or obligations. * * * *and no action or proceeding then pending before any court or tribunal in which any constituent corporation is a party or in which any stockholder is a party shall abate or be discontinued*

by reason of such consolidation, but may be prosecuted to final judgment as though no consolidation had been entered into; *or such consolidated corporation may be substituted as a party in place of any constituent corporation, by order of the court in which such action or proceeding may be pending.*" (Emphasis supplied)

It is significant that the language of the consolidation statute that "no action or proceeding then pending • • • shall abate • • •," does not appear in the merger statute, but instead thereof the merger statute requires the possessor corporation to assume the liabilities and obligations of the merged corporation.

Both laws are clearly designed to protect corporate creditors and to permit the protection and preservation of the corporate assets. In pending suits they permit the substitution of the new or continuing corporation for the merged and dissolved corporations. Criminal prosecution is neither mentioned nor considered.

The Court of Appeals relied on the opinion of Judge Weinfeld in the case of *United States of America v. Cigarette Merchandisers Association, Inc. et al,* 136 F.Supp. 214, in his interpretation of Section 90 of the New York Stock Corporation Law. The Court of Appeals in discussing that case recognizes the distinction between merger and consolidation in New York, but concludes that because the consolidation statute preserves "actions," though the merger statute does not, the state's public policy in both must be deemed to be governed by the former. We submit that the inclusion in one and the exclusion in the other is convincing of the legislative intent to the contrary.

The *Cigarette* decision, supra, rests primarily on the General Construction Law of New York (Art. 2 and 7, Ch. 22, Consolidated Laws of New York (Laws of 1909, Ch. 27)), which provides that it "shall apply to every statute unless its general object or the context of the language construed or other provisions of the law indicate that a

different meaning or application was intended from that required to be given by this statute." (Art. 7, Ch. 22, Sec. 110)

Art 2, Ch. 22, Sec. 11-a defines "action" as including a prosecution for the "punishment of a public offense," stating that, "actions are of two kinds, civil and criminal." Art. 2, Ch. 22, Sec. 18-a defines a "criminal action" as follows: "A 'criminal action' is prosecuted in the name of the people of the State of New York, as plaintiffs, against a party charged with crime."

If we are correct in our contention that the context, object and general language of Section 90 clearly point to the preservation of civil liabilities only, then the General Construction Law definition of "action" as including criminal prosecutions would under Section 110 of that Act be inapplicable.

If it should be deemed applicable, the definition still would not apply to this case, because the construction statute specifically limits criminal actions to those prosecuted by the State of New York, and so by implication eliminates federal prosecution.

On both of these points the Tenth Circuit Court itself has decisively spoken in the case of *United States v. Safeway Stores, Inc.*, 140 F. 2d 834 (10th Cir. 1944). In that case, Delaware, Nevada, California and Texas corporations were merged into a parent corporation, and as to each the Court held the corporations nonexistent for antitrust prosecution.

In a careful analysis of the statutes of each state, it holds that their language, almost identical with that of New York, refers to civil proceedings, not to criminal prosecutions.

As to the Texas statute, which specifically preserves state criminal prosecutions, the Court says, at p. 839:

"The Texas statute empowers the directors to maintain or defend judicial proceedings. It does include actions for a fine, forfeiture, or penalty that the State of Texas has, or may have, against the dissolved corporation. *But fines, forfeitures, or penalties due other sovereignties are necessarily excluded.*" (Emphasis supplied)

The Court's position on that point is sustained by *United States v. Leche et al,* 44 F.Supp. 765, 766, 767 (E.D.La.), and by *Ex parte Schreiber et al,* 110 U.S. 76, 3 S.Ct. 423, 28 L.Ed. 65.

As to the word "suit," which also appears in the New York statutes, *Safeway* says, at p. 838, after citing many authorities from various states and the United States Supreme Court: "It is therefore apparent under the decisions that the word 'suit' as used in the Delaware and Nevada statutes does not embrace a criminal prosecution."

As to the term "action," which is used in the California statute, *Safeway* says, at pp. 838, 839:

"The California statute, it will be observed, uses the phrase, 'prosecuting and defending actions by or against it.' Many of our courts have been called upon to define the word 'action', and from a review of those authorities, the term is held to mean civil actions and does not embrace criminal prosecutions.

* * *

"It is apparent that the California statutes do not include criminal prosecutions but rather * * * indicate that the provision has reference to winding up the affairs of the corporation, payment of its debts, and the distribution of its assets, and not to criminal proceedings."

The Court sustains its position in *Safeway* with the citation of a wealth of authority.

Safeway is relied on in *United States v. Line Material Co.*, 202 F.2d 929 (6th Cir. 1954), and criticized in *United States v. P. F. Collier & Son Corp.*, 208 F.2d 936 (7th Cir. 1953).

The catchall provision of the General Corporation Law of New York, Art. 2, Ch. 23, Sec. 29, Consolidated Laws of New York (Laws of 1929, Ch. 650), Appendix C, speaks decisively of the preservation of civil obligations only.

We respectfully submit that the court below erred in its interpretation of the New York law and in reversing the district court as to petitioner.

CONCLUSION

For these reasons it is respectfully submitted that this petition should be granted.

Respectfully submitted,
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Attorneys for Petitioner.

April, 1956.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Criminal Action No. 11678

UNITED STATES OF AMERICA,
Plaintiff,

vs.

UNION CARBIDE AND CARBON CORPORATION, ET AL.,
Defendants.

Honorable Stanley N. Barnes, Assistant Attorney General, Worth Rowley, Special Assistant to the Attorney General, Charles L. Whittinghill, Esquire, Raymond M. Carlson, Esquire, and John P. Kelly, Esquire, 470 Post Office Building, Denver, Colorado, for Plaintiff; Messrs. Grant, Ellis, Shafroth and Toll, Attorneys at Law, Equitable Building, Denver, Colorado, for Defendants.

MEMORANDUM OPINION AND ORDER

KNOUS, Chief Judge.

A criminal information was filed September 2, 1948, by the United States of America, charging Union Carbide and Carbon Corporation, and three subsidiary corporations, Electro Metallurgical Company, United States Vanadium Corporation and Electro Metallurgical Sales Corporation, with violations of Sections 1 and 2 of the Sherman Act, Title 15, U.S.C.A., in conspiring to fix prices and to monopolize sales of ferro-vanadium and vanadium oxide. All defendants entered pleas thereto of not guilty on September 21, 1948.

Subsequently, Electro Metallurgical Company was dissolved on December 31, 1949, pursuant to the laws of West Virginia. Electro Metallurgical Sales Corporation, a New

York corporation, and United States Vanadium Corporation, a Delaware corporation, were merged with defendant Union Carbide and Carbon Corporation pursuant to the laws of the state of their incorporation on February 28, 1949, and December 30, 1950, respectively. It is stated by affidavit of Mr. Ralph R. Browning, a Director and Vice-President of Union Carbide and Carbon Corporation that this change in corporate structure was done in good faith and pursuant to sound business practices, with no consideration of the pending action.

The defendant Union Carbide and Carbon Corporation has moved to dismiss the information as to the three aforementioned subsidiary defendants on the ground that they are no longer in existence.

It is well settled that the laws of the state of incorporation will govern the effect to be given a merged or dissolved corporation. *Oklahoma National Gas Co. v. State of Oklahoma,* 273 U.S. 257; *United States v. Safeway Stores,* 10 Cir., 140 F. (2d) 834. Therefore, the law of Delaware, West Virginia and New York will govern.

All three states, as well as the vast majority of jurisdictions in this country, state that at common law a dissolved or merged corporation is as if it did not exist and all pending litigation, being either criminal or civil, abates. *Commercial Bank v. Lockwood's Adm'r.,* 2 Har. (Del.) 8; *Miller's Adm'x. v. Newburg Orrel Coal Co.,* 31 W. Va. 836, 8 S.E. 600; *In re National Surety Co.,* 286 N.Y. 216, 36 N.E. (2d) 119. Thus, unless the statutes of the respective states abrogate the common law rule that criminal actions against corporations abate upon dissolution or merger, that rule is still applicable.

The pertinent provisions of the controlling statutes are Sections 261, 278 and 282 of the Delaware Code Annotated; Section 3095 (83) of the West Virginia Code, and Sections 85 and 105 of New York Consolidated Laws. To be sure, these statutes are not literally parallel, but their provisions

for the purposes of this determination are enough alike in their effect so that a complete recital thereof is not warranted. Suffice it to say that the pertinent provisions of the Delaware statute provide for survival of "actions, suits or proceedings" after dissolution, the West Virginia Code provides for "suits to be brought, conducted, prosecuted or defended," and the New York sections apply to "liabilities and obligations."

Neither counsel for the movant nor counsel for the Government has brought to the Court's attention any decision of the respective state courts construing their statutes in regard to the precise point in consideration, nor has any such authority been found. However, in the case of *United States v. Safeway Stores*, supra, The Court of Appeals for the Tenth Circuit interpreted the Delaware statute, among others, and came to the conclusion that "actions, suits or proceedings" under the Delaware code do not encompass criminal actions, and that such would not lie against a corporation which had been priorily dissolved.

This Court is bound by this decision, barring a subsequent and contrary interpretation of the Delaware statute by its own courts. The Government contends that the Delaware court has given this statute a contrary interpretation in *Addy v. Short*, 89 A (2d) 136, and that this Court should follow *United States v. Collier*, 7 Cir., 208 F. (2d) 936, which reached a result contrary to the *Safeway* case, partly on the basis of this Delaware decision. But an examination of the *Addy* case will disclose that it is a civil action in the nature of ejectment to secure the vesting of a possibility of reverter. There is no language therein suggesting an interpretation of the statute in regard to criminal procedure, and, consequently, this Court feels the case to have no bearing on the question presented here, and as decided in *United States v. Safeway Stores*, supra.

The Government advocates that a distinction be drawn between an *ante-litem* dissolution, as in the *Safeway* case,

and a *pendente lite* dissolution as in the case at bar. A good-faith dissolution by merger subsequent to the indictment for Sherman Act violations was presented in *United States v. Line Material*, 6 Cir., 202 F. (2d) 929, and the Court of Appeals in that case reached the same conclusion as was reached in the *Safeway* case (which it cited with approval) in regard to the interpretation of the Delaware statute. The Court is of the opinion that on the basis of that case no real distinction is here presented.

The *Safeway* case is also a negative answer to the Government's contention that the three subsidiary corporations are in reality still in existence for the purposes of this suit. There is no contention that the laws of the states of incorporation were not complied with. It is clear then, by a reading of the *Safeway* case, that a dissolved or merged corporation may be subject to *civil* proceedings under the statutes, but unless the particular statute pertains to criminal actions, it does not follow as a matter of course that the latter actions are preserved and the corporation is still in de facto existence for that purpose. Rather, the common law rule mentioned above prevails in the absence of statutory abrogation.

Inasmuch as this Court is bound by the decision of the Court of Appeals in *United States v. Safeway Stores*, supra, that "suits, actions and proceedings" under the Delaware code do not embrace criminal prosecutions, it is only consistent in adhering to that decision that "suits" under West Virginia Law do not include criminal actions. No West Virginia cases have been cited, nor can any be found giving a contrary interpretation.

As to the New York law, the Government relies heavily upon an opinion by the Federal District Court for the Southern District of New York. *In re Grand Jury Subpoenas Duces Tecum Addressed to Canadian International Paper Company*, 72 F. Supp. 1013. That case indicated that "liabilities or obligations" under Section 216 of the

New York General Corporation Law included fixed liability to the United States of both civil and criminal nature. But there is a clear and valid distinction between statutes providing for procedure following a certificate of surrender to do business within the state, which is involved in the aforementioned Section 216, and procedure following dissolution by merger which is involved here.

Furthermore, it is to be noted that this case is not one in which a court of New York is interpreting its own statutes, but rather a Federal District Court. Therefore, there being no contrary interpretation of the New York statute in question here by its own tribunal, the philosophy of the *Safeway* case speaking of "actions, suits or proceedings" also includes "liabilities and obligations," and is controlling. Therefore, it is

ORDERED AND ADJUDGED that the motion to dismiss the criminal information as to Electro Metallurgical Company, United States Vanadium Corporation, and Electro Metallurgical Sales Corporation, be and the same is hereby granted.

DATED at Denver, Colorado, this seventeenth day of June, A.D. 1955.

WILLIAM LEE KNOUS
William Lee Knous,
Chief Judge

APPENDIX B

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

NOVEMBER TERM, 1955

UNITED STATES OF AMERICA,
Appellant,

vs.

UNITED STATES VANADIUM CORPORATION, ELECTRO METALLURGICAL COMPANY AND ELECTRO METALLURGICAL SALES CORPORATION,
Appellees.

Number 5211

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Worth Rowley, Attorney, Dept. of Justice, (Charles L. Whittinghill, Marshall C. Gardner, Attorneys, Dept. of Justice, Stanley N. Barnes, Assistant Attorney General, and Donald E. Kelley, United States Attorney, were with him on the brief) for Appellant;

John F. Shafroth and Morrison Shafroth (Erl H. Ellis; Grant, Shafroth and Toll were with them on the brief) for Appellees.

Before HUXMAN, MURRAH and PICKETT, United States Circuit Judges.

HUXMAN, Circuit Judge.

The sole question presented for decision is whether three subsidiary corporations against whom criminal proceedings are pending are entitled to have such criminal proceedings abated, when they thereafter are merged with a parent corporation and have surrendered their charter.

The three subsidiaries against whom criminal actions

were pending at the time they were merged with their parent, the Union Carbide and Carbon Corporation, were the Electro Metallurgical Company, a West Virginia corporation, the United States Vanadium Corporation, a Delaware corporation, and the Electro Metallurgical Sales Corporation, a New York corporation. Upon merger with their parent the three subsidiaries were dissolved under the laws of the state of their incorporation. The trial court decided the question in the affirmative and dismissed the criminal proceedings pending against them; the Government has appealed.

There is no conflict in the basic principles of law which must guide us in seeking the correct answer. Thus it is established without exception that at common law, upon dissolution, a corporation ceases to exist for all purposes. It can no more be sued civilly or prosecuted criminally than can a natural person who has died.[1] It is equally well established that such common law status relating to dissolved corporations has been modified and changed by statute in the various states and that under such statutes proceedings and actions as authorized thereby may be maintained against such corporations. Also well settled is the principle that in determining whether upon dissolution the life of a corporation comes to an end for all purposes or whether it remains in a state of suspended animation so to speak for the purposes of the statute, we look to the state law and its construction by the state courts.

No decisions by the courts of Delaware, West Virginia, or New York are cited and our search has failed to reveal any which would definitely and completely answer this question. In United States v. Safeway Stores, Inc., 140 F. 2nd 834, we held that a criminal prosecution brought against a dissolved Delaware corporation did not survive. This conclusion is supported by the Sixth Circuit in United States

[1] See United States v. Safeway Stores, Inc., 140 F.2d 834, and cases there cited.

v. Line Material Company, 202 F. 2d 929. However, in United States v. P. F. Collier and Son Corporation, 208 F. 2d 936, the Seventh Circuit reached a contrary conclusion. In light of these later decisions we are asked to re-examine the *Safeway* case and, in effect, are asked to overrule it. Assuming without deciding that members of this panel of the court are not in full sympathy with the law as declared in the *Safeway* case, for reasons presently stated we nonetheless adhere to the doctrine there announced. We feel that one panel of the court should not lightly overrule a decision by another panel. To do so puts the law into a state of flux, and no one can tell what the law will be until the composition of the court is determined. Since the Circuits are not in agreement as to the law of Delaware and until the Supreme Court has spoken, we adhere to the law as declared in the *Safeway* case, *supra*. Since we have reached this conclusion, nothing of value would be added if we analyzed the decisions of the three Circuits which have construed the Delaware law.

Appellee Electro Metallurgical Company was a West Virginia corporation. The law of West Virginia with respect to dissolved corporations provides with limitations that suits may be brought, conducted, prosecuted or defended, etc., after dissolution.[2] No decisions have been

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[2] Sec. 3095 (1949) provides:
"EFFECT OF DISSOLUTION OR EXPIRATION.
"When a corporation shall expire or be dissolved as prescribed in this article, its property and assets shall be subject to the payment of the corporate obligations and the expenses of winding up its affairs, * * *. The board of directors and the executive officers in office at the date of such expiration or dissolution, * * * may cause suits to be brought, conducted, prosecuted or defended, the real and personal property of the corporation to be conveyed or transferred under the common seal or otherwise, further assurances of previous conveyances to be made, and all lawful acts to be done, in the corporate name, in like manner and with like effect as before such dissolution or expiration; but so far only as shall be necessary or proper to do and perform every act and thing which should have been or should be done and performed by the corporation, and for collecting the debts and claims due to the corporation, converting its property and assets into money, prosecuting, defending, and protecting its rights, enforcing all claims in its favor, and paying over and distributing its property and assets, or the proceeds thereof, to those entitled thereto."

found interpreting the West Virginia dissolution law. In many aspects it resembles the law of Delaware. We find nothing therein which would require a different conclusion from that with respect to the Delaware law.

With respect to the New York subsidiary a somewhat different picture is presented. While no New York decisions are cited which have specifically passed upon the question, there are certain decisions which point the way. There was also filed with us at the time of oral argument a photostatic copy of an opinion by United States District Judge Weinfeld of the Southern District of New York, in which he held that under New York law a criminal action survived the dissolution of a corporation.[3] In reaching this conclusion he relied upon Section 90 of the New York stock corporation law which provides, "The rights of creditors of any constituent corporation shall not in any manner be impaired, nor shall any liability or obligation due or to become due, or any claim or demand for any cause existing against any such corporation or against any stockholder thereof be released or impaired by any such consolidation; * * * and no action or proceeding then pending before any court or tribunal in which any constituent corporation is a party * * * shall abate or be discontinued by reason of such consolidation, but may be prosecuted to final judgment, as though no consolidation had been entered into; * * *." Attention was also called to Section 11-a of the New York General construction law which provides that " 'Action' when applied to judicial proceedings, signifies an ordinary prosecution in a court of justice, by a party against another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Actions are of two kinds: civil and criminal." From this Judge Weinfeld concluded that the word "action" in Section 90 embraces both civil and criminal proceedings. With this reasoning we agree.

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[3] See United States of America v. Cigarette Merchandisers Association, Inc., et al, opinion filed November 23, 1955.

But aside from statutory construction and consideration, Judge Weinfeld concluded that the clear public policy of New York with respect to dissolved or consolidated corporations included the "right of the community to vindicate any charge against the corporation for crimes it may have committed prior to dissolution."

Appellees seek to distinguish the *Cigarette Merchandisers* case on the ground that it was decided under Section 90 dealing with consolidations, while these cases arose under Section 87 and Section 29 of the New York Code which deal with the merger of corporations. For the decision of the question before us, this in our view is a distinction without a difference. Neither Section 85 nor Section 29 deal with what pending causes of action survive the dissolution of a corporation. Section 29 merely provides that in the event of a dissolution of a corporation for any cause or in any manner its corporate existence shall continue for the purpose of winding up its affairs, and Section 85 provides that when a certificate is filed all the property of the merged corporation vests and is held and enjoyed by the successor corporation subject to all liabilities and obligations of the merged corporation. Subsection 8 of Section 105 provides that such a corporation shall continue for the purpose of satisfying obligations and collecting assets, and that for such purposes it may sue and be sued.

The *Cigarette Merchandisers* case was not decided on the narrow ground that the law declared therein applied only in the case of consolidation and was not intended to cover mergers. In the statement of facts in that case it is stated that the stockholders of the "Rowe" Corporation "voted to *merge*[4] and consolidate," and further on it is stated that under the New York law governing consolidation a merged corporation is continued for purposes of criminal prosecution.

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[4] Emphasis supplied.

There is, of course, a legal and technical distinction between merger and consolidation of two companies, which for some purposes may become important. However, for the purpose of answering the question presented to us, it is in our view immaterial whether there is a merger or consolidation. In the case of a merger the merged corporation is absorbed by the merging company and ceases to exist, while the merging company continues its existence. In the case of a consolidation of two companies, a new entity is created into which both of the consolidated companies are absorbed. In each instance the question is what becomes of criminal prosecutions pending against companies which now no longer exist, either as a result of a merger or of a consolidation.

We see nothing in Section 87 which leads us to conclude that with respect to liability under a pending criminal action the status of a non-existent corporation resulting from a merger is controlled by different principles of law than is the status of such a company when it becomes extinct by consolidation.

Since the decision in the *Cigarette Merchandisers* case is by a federal court, it is of course not binding upon us. We, however, feel that it is a well reasoned case and that it correctly analyzes the New York law. It is our conclusion that under New York law a criminal action pending against a corporation which is merged survives the same as in the case of its consolidation.

In United States v. Electro Metallurgical Company and in United States v. United States Vanadium Corporation the judgments are AFFIRMED. In United States v. Electro Metallurgical Sales Corporation the judgment is REVERSED and the cause is remanded for proceedings in conformity with the views expressed herein.

APPENDIX C

CONSOLIDATED LAWS OF NEW YORK

Stock Corporation Law, Art. 8, Ch. 59, Sec. 85.1, 2, and Sec. 90 (Laws of 1923, Ch. 787, amending generally Laws of 1909, Ch. 61)

General Corporation Law, Art. 2, Ch. 23, Sec. 29 (Laws of 1929, Ch. 650)

Sec. 85. Merger.

1. Any domestic stock corporation or any foreign stock corporation authorized to do business in this state owning at least ninety-five per centum of the outstanding shares of each class of the stock of any other domestic stock corporation, authorized to engage in business similar or incidental to the business which the possessor corporation is authorized to engage in, and any domestic stock corporation owning at least ninety-five per centum of the outstanding shares of each class of the stock of any foreign stock corporation authorized to do business in this state and authorized to engage in business similar or incidental to the business which the possessor corporation is authorized to engage in, may file in the department of state a certificate of such ownership, in its name and under its corporate seal, signed by its president or a vice-president and its secretary or treasurer and setting forth a copy of the resolution of its board of directors to merge such other corporation, and to assume all of its obligations, and the date of the adoption thereof, provided, however, that in case the possessor corporation shall not own all the outstanding stock of the other corporation to be merged, the resolution of the board of directors of the possessor corporation shall state the term and conditions of the merger, including the securities, cash or other consideration to be issued, paid or delivered by the possessor corporation upon surrender of each share of the merged corporation not owned by the possessor corporation, and provided further that prior to the filing of the certificate in the department of state, the possessor corporation shall mail to each stockholder of record of the corporation to be merged a copy of such resolution and notice of adoption thereof, and the certificate shall state that the resolution and notice have been so mailed. Upon the filing of such certificate, all of the estate, property, rights, privileges and franchises of such other corporation, shall vest in and be held and enjoyed by such possessor

corporation as fully and entirely and without change or diminution as the same were before held and enjoyed by such other corporation, and be managed and controlled by such possessor corporation, and, except as provided in subdivision three of this section, in its name, but subject to all liabilities and obligations of such other corporation and the rights of all creditors thereof. The possessor corporation shall not thereby acquire power to engage in any business or to exercise any right, privilege or franchise of a kind which it could not lawfully engage in or exercise under the provisions of the law by or pursuant to which such possessor corporation is organized.

2. The possessor corporation shall be deemed to have assumed all the liabilities and obligations of the merged corporation and shall be liable in the same manner as if it had itself incurred such liabilities and obligations.

Sec. 90. Rights of Creditors of Consolidated Corporations.

The rights of creditors of any constituent corporation shall not in any manner be impaired, nor shall any liability or obligation due or to become due, or any claim or demand for any cause existing against any such corporation or against any stockholder thereof, be released or impaired by any such consolidation; but such consolidated corporation shall be deemed to have assumed and shall be liable for all liabilities and obligations of each of the corporations consolidated in the same manner as if such consolidated corporation had itself incurred such liabilities or obligations. The stockholders of the respective constituent corporations shall continue subject to all the liabilities, claims and demands existing against them as such, at or before the consolidation; and no action or proceeding then pending before any court or tribunal in which any constituent corporation is a party, or in which any stockholder is a party, shall abate or be discontinued by reason of such consolidation, but may be prosecuted to final judgment, as though no consolidation had been entered into; or such consolidated

corporation may be substituted as a party in place of any constituent corporation, by order of the court in which such action or proceeding may be pending.

GENERAL CORPORATION LAW
Art. 2, Ch. 23

Sec. 29. Corporate existence to continue in case of dissolution; authority of directors

Upon the dissolution of a corporation for any cause and whether voluntary or involuntary its corporate existence shall continue for the purpose of paying, satisfying and discharging any existing liabilities or obligations, collecting and distributing its assets and doing all other acts required to adjust and wind up its business and affairs, and it may sue and be sued in its corporate name. Unless other persons shall be designated by law or by a court of competent jurisdiction, the directors shall have full power to settle its affairs and to distribute to the persons entitled thereto the assets remaining after the payment of debts and necessary expenses. During the period of adjusting and winding up the business and affairs of such corporation, the directors may, from time to time, elect or appoint officers of the corporation having the powers and duties provided in the by-laws existing at the time of such dissolution, and such other powers and duties as may be conferred upon them by resolution of the directors; and such other agents, employees, accountants and counsel as in the judgment of the directors may be required.

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384945—56

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 849

ELECTRO METALLURGICAL SALES CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 16–21) has not yet been reported. The opinion of the district court (Pet. 11–15) is reported in 132 F. Supp. 388.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1956. The time for filing a petition for a writ of certiorari was extended by Mr. Justice Clark, on March 12, 1956, to April 11, 1956. The petition for a writ of certiorari

was filed on April 11, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether under New York law pending criminal proceedings survive the merger of a corporate defendant.

STATUTES INVOLVED

The pertinent provisions of Sections 1, 2, and 8 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U. S. C. 1, 2, and 7, commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 8. The word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by

> the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Pertinent provisions of the New York Stock Corporation Law and General Corporation Law are set forth in the petition, pp. 23–25.

STATEMENT

This petition and the Government's petition in No. 848, this Term, seek review of different parts of the same judgment of the court of appeals. The facts are set forth in the petition in No. 848 (pp. 6–8), and we shall not repeat them in detail here. In brief, they are that two corporations and three wholly-owned subsidiaries of one of them were charged by information with violating Sections 1 and 2 of the Sherman Act; that, following the filing of the information, one of the subsidiaries, a West Virginia corporation, was dissolved, pursuant to the laws of that state, and the other two, a Delaware and a New York corporation, respectively, were merged with their parent; that, upon the parent's motion, the district court dismissed the information as to the three subsidiaries, on the ground that the law of the state of incorporation determines whether merger or dissolution abates a Sherman Act criminal proceeding, and that under the laws of the respective states of incor-

poration a criminal action does not survive merger or dissolution.

On appeal, the Court of Appeals for the Tenth Circuit affirmed the dismissal as to the Delaware and West Virginia corporations but reversed the dismissal as to the New York corporation. The court held that the question whether a criminal action abates upon merger or dissolution was to be determined by state law, and it concluded that under New York law a criminal action survives dissolution, but that under Delaware and West Virginia law it does not.

In No. 848 the Government is seeking review of that portion of the judgment below which affirmed the dismissal of the information as to the West Virginia and Delaware corporations. Petitioner here seeks review of that part of the judgment which reversed the dismissal as to the New York corporation.

ARGUMENT

1. The petition presents only a narrow question of state law: whether, under the provisions of the pertinent New York statutes, a pending criminal proceeding against a New York corporation is abated by the merger of that corporation. Concededly, no federal question, important or otherwise, is presented; and no conflict of decisions is asserted. This case therefore does not call for further review by this Court, particularly since,

as we show *infra*, pp. 6–8, the court of appeals' interpretation of New York law is clearly correct.

The fact that in No. 848 the Government is seeking review of other portions of the judgment below is not, as petitioner suggests (Pet. 4), an adequate reason for granting review in this case. In No. 848 the Government has urged, as the primary ground for review, the existence of an important federal question;[1] in the instant case, the sole basis for the review sought is an alleged error by the court of appeals in interpreting state law. The Government also urges, as an additional ground for review in No. 848, that the court of appeals' interpretation of Delaware law conflicts with the interpretation of that law by another circuit[2] and has no support in state decisions. The interpretation of New York law which petitioner here challenges is not in conflict with that of any other circuit, and it is in accord with a well-reasoned and persuasive opinion by a

[1] The federal question is whether a merged or dissolved corporation which, under the law of the state of incorporation, continues to exist for many purposes (even if not for purposes of state criminal prosecution), is an "existing" corporation under Section 8 of the Sherman Act and therefore remains subject to criminal prosecution under that Act. See petition, No. 848, pp. 8–11.

[2] The primary holding of the court of appeals as to which there is a conflict is that under Delaware law criminal proceedings do not survive the merger or dissolution of corporate defendants. See petition, No. 848, pp. 11–13. The court reached the same conclusion as to West Virginia law only because of the latter's similarity to Delaware law.

federal district judge sitting in New York (see *infra*, pp. 7–8). Furthermore, in No. 848 the Court would reach the state law question only if it decided the federal question adversely to the Government, since it is conceded that dissolved corporations do continue in existence for many purposes under the laws of Delaware and West Virginia. The two petitions, therefore, rest on entirely different bases.

2. The court of appeals correctly held that under New York law a merged or dissolved corporation continues subject to pending criminal prosecution. The New York corporate dissolution statute (New York Stock Corporation Law, § 90) provides that "no action or proceeding then pending before any court or tribunal in which any constituent corporation is a party * * * shall abate or be discontinued by reason of such consolidation, but may be prosecuted to final judgment, as though no consolidation had been entered into * * *." Section 11–a of the New York General Construction Law, which by Section 110 is made "applicable to every statute" except where it appears that a different meaning or application is intended, provides: " 'Action' when applied to judicial proceedings, signifies an ordinary prosecution in a court of justice, by a party against another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Actions are of two kinds: civil and

criminal." We submit that when these two sections are read together, they manifest a clear legislative intent that pending criminal proceedings are not to be abated by the dissolution of corporate defendants.[2]

New York judicial authority supports this view. In *People* v. *Bankers' Capital Corp.*, 137 Misc. 293, 241 N. Y. S. 693, it was held that a quasicriminal action to recover a fine or penalty could be maintained against a foreign corporation which previously had surrendered its certificate of authority to do business in New York State. Cf. *People* v. *Elliott*, 172 N. Y. 146, holding that "action" includes both criminal and civil actions under a statute authorizing the reading of testimony of deceased persons at a second trial. Finally, in *United States* v. *Cigarette Merchandisers Association*, 136 F. Supp. 214 (S. D. N. Y.), appeal pending *sub. nom. The Rowe Corporation* v. *United States*, C. A. 2, No. 23,948, Judge Weinfeld held that under New York law a pending criminal proceeding is not abated by

[2] Petitioner argues (Pet. 5–7) that since the New York merger statute provides only that the surviving corporation shall assume all the liabilities and obligations of the merged company, and does not provide, as does the consolidation statute, that pending actions or proceedings shall not be abated, the merger statute does not provide for survival of criminal proceedings. But the provision of the merger statute upon which petitioner relies relates to the liabilities of the surviving corporation; it does not purport to deal with the extent to which the merged corporation continues to exist after the merger.

the merger and dissolution of a corporate defendant. This well-reasoned opinion by a New York federal judge carefully considers the pertinent New York statutes and judicial decisions, and we submit that the court of appeals in the instant case properly held (Pet. 21) that it "correctly analyzes the New York law."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
STANLEY N. BARNES,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
Attorney.

MAY 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956